FILED
OCT 28 1948
CHARLES ELMORE CROPLEY
CLERK

No. 370

Supreme Court of the United States

OCTOBER TERM, 1948

SOUTHWESTERN GREYHOUND LINES, INC., a Corporation, MID-CONTINENT COACHES, INC., a Corporation, and SOUTHWESTERN MOTOR CARRIERS CORPORATION, a Corporation d/b/a SOUTHWESTERN TRAILWAYS,
Petitioners,
VERSUS
LEO F. KING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches Inc., a corporation and Southwestern Motor Carriers Corporation, a corporation dba Southwestern Trailways, Petitioners,
By EARL PRUET,
First National Building,
Oklahoma City, Oklahoma,
Their Attorney.

Of Counsel:
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JOHN F. EBERLE,
First National Building,
Oklahoma City, Oklahoma.

October, 1948.

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INDEX

PAGE

SUBJECT INDEX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Opinion Below 2

Jurisdiction 2

Question Presented 2

Whether under the written contract attached to the Amendment to the Complaint, marked "Exhibit A," the status of the respondent was that of an independent contractor, or did he hold a "Position in the Employ" of the petitioners within the provisions of Selective Training and Service Act of 1940, Section 308, Title 50 App. USCA. The parts of the Act applicable 2-3

Summary Statement of the Matter Involved 3

Reasons for the Allowance of the Writ 4

SUPPORTING BRIEF

First: The decision in this case is contrary to that in Brown v. Luster et al., 165 Fed. (2d) 181 4

Second: The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decisions of the Supreme Court of Oklahoma 5

Third: The decision of the Circuit Court of Appeals for the Tenth Circuit in the instant case is in direct conflict with the decisions of this Court in the cases of United States, Petitioner, v. Silk et al., and Harrison v. Grey Van Lines, Inc., 331 U. S. 704, 67 Sup. Ct. 1463 6

Conclusion 6

PAGE

Authorities Cited

Table of Cases

Atlas Life Insurance Co. of Tulsa v. Foraker et al., 165 Pac. (2d) 323 5

Bokoshe Smokeless Coal Company v. Moorehead, 126 Pac. 1033 5

Bradley v. Chickasha Cotton Oil Company, 84 Pac. (2d) 629 6

Brown v. Luster et al., 165 Fed. (2d) 181 4

Butcher Packing Company v. Hixon, 119 Pac. (2d) 1109 .. 5

Cities Service Oil Co. et al. v. Kindt, 190 Pac. (2d) 1007 .. 5

Sawin et al. v. Pease, 97 Pac. (2d) 27 6

United States v. Silk et al., and Harrison v. Grey Van Lines, Inc., 331 U. S. 704, 67 Sup. Ct. 1463 4

White v. McGee, 11 Pac. (2d) 924 5

Statutes and Regulations

Judicial Code, Sec. 240 (28 USCA, Sec. 347, Title 28, USCA 1254) 2

Motor Carrier Act, Title 49 USCA, Sections 316 and 317 .. 5

50 U. S. C. A., Sec. 308 4

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches, Inc., a corporation, and Southwestern Motor Carriers Corporation, a corporation d/b/a Southwestern Trailways, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered the 6th day of August, 1948.

OPINION BELOW

The opinion sought to be reviewed is Leo F. King v. Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches, Inc., a corporation, and Southwestern Motor Carriers Corporation, a corporation, d/b/a Southwestern Trailways in the record herein, pages 19 to 23, inclusive. The order of the District Court sustaining the motion to dismiss is likewise in the record herein, page 14.

JURISDICTION

This Court has jurisdiction to review said judgment under Section 240 of the Judicial Code (28 USCA, Sec. 347, Title 28, USCA 1254).

QUESTION PRESENTED

Whether under the written contract attached to the Amendment to the Complaint, marked "Exhibit A," the status of the respondent was that of an independent contractor, or did he hold a "Position in the Employ" of the petitioners within the provisions of Selec-

tive Training and Service Act of 1940, Section 308, Title 50 App. USCA. The parts of the Act applicable[1]

SUMMARY STATEMENT OF THE MATTER INVOLVED

The substance of the terms of the written contract are set out in the opinion of the Circuit Court of Appeals (R. 19-23, incl.).

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1. "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training or from hospitalization continuing after discharge for a period of not more than one year—

* * * * * *

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during the period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any case and shall advance it on the calendar * * *."

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Tenth Circuit is in direct conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the case of *Brown* v. *Luster et al.*, 165 Fed. (2d) 181.

2. The Circuit Court of Appeals for the Tenth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

3. The Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

SUPPORTING BRIEF

First.

The decision in this case is contrary to that in *Brown* v. *Luster et al.*, 165 Fed. (2d) 181.

In that case, under the facts, the Court applied the rule announced in the cases of *United States* v. *Silk et al.*, and *Harrison* v. *Grey Van Lines, Inc.*, 331 U. S. 704, 67 Sup. Ct. 1463, and in the opinion the Court discussed Section 308 of 50 U. S. C. A. That Court held that Brown, a commission salesman for M. R. Luster and A. M. Luster doing business as Sunbeam Furniture Company was an independent contractor and did not hold a "position in the employ" of the respondents within the provisions of the Act.

In the opinion of the Circuit Court of Appeals for the Tenth Circuit in the instant case, the court reversed the District Court's order sustaining petitioners' motion to dismiss upon the control given petitioners over the respondent in the contract as to the details in the operation of the depot.

Petitioners are common carriers of passengers for hire, and they are governed by both statutes and the rules and regulations of the Interstate Commerce Commission. The control granted the petitioners in the contract is nothing more than petitioners seeking to comply with the laws and regulations promulgated for the benefit of the Public,[2] through their independent contractor. The contract is silent as to the right of the petitioners to exercise any control in the physical details of operation of the station.

Second.

The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decisions of the Supreme Court of Oklahoma.

—*White* v. *McGee*, 11 Pac. (2d) 924;

Cities Service Oil Co. et al. v. *Kindt*, 190 Pac. (2d) 1007;

Bokoshe Smokeless Coal Company v. *Moorehead*, 126 Pac. 1033;

Atlas Life Insurance Co. of Tulsa v. *Foraker et al.*, 165 Pac. (2d) 323;

Butcher Packing Company v. *Hixon*, 119 Pac. (2d) 1109;

2. Motor Carrier Act, Title 49 USCA, Sections 316 and 317.

Sawin et al. v. *Pease*, 97 Pac. (2d) 27;

Bradley v. *Chickasha Cotton Oil Company*, 84 Pac. (2d) 629.

Third.

The decision of the Circuit Court of Appeals for the Tenth Circuit in the instant case is in direct conflict with the decisions of this Court in the cases of *United States, Petitioner,* v. *Silk et al.*, and *Harrison* v. *Grey Van Lines, Inc.*, 331 U. S. 704, 67 Sup. Ct. 1463.

It is respectfully submitted that a Writ of Certiorari should be granted.

Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches Inc., a corporation and Southwestern Motor Carriers Corporation, a corporation dba Southwestern Trailways, Petitioners,

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